

6-22-2010

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Recommended Citation

Bryan D. Kreykes, *Toward a Model of Humanitarian Intervention: The Legality of Armed Intervention to Address Zimbabwe's Operation Murambatsvina*, 32 Loy. L.A. Int'l & Comp. L. Rev. 335 (2010).
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Toward a Model of Humanitarian Intervention: The Legality of Armed Intervention to Address Zimbabwe's Operation Murambatsvina

BRYAN D. KREYKES*

I. INTRODUCTION: OPERATION MURAMBATSVINA¹

On the morning of May 19, 2005, residents of Harare's urban townships woke to the rumble of heavy machinery.² Operation Murambatsvina ("Operation" or "Murambatsvina") was about to begin.³ Over the next few months, the Zimbabwean government used the excuse of addressing unlicensed urban settlements to systematically destroy the homes and businesses of hundreds of thousands of its citizens.⁴ Eyewitnesses testified that police forced citizens to dismantle and burn their property, savagely beating those who resisted or did not comply quickly enough.⁵ Despite outcry from human rights groups and the international community,⁶ the Operation continued through the months of June and July.

* Law clerk to the Honorable Dickinson R. Debevoise, Senior District Judge, United States District Court for the District of New Jersey; Juris Doctor, New York University School of Law, 2007. I dedicate this article to the late Thomas M. Franck, a great scholar and inspiring professor, who first introduced me to its subject matter.

1. The government translation for "Operation Murambatsvina" is "Operation Restore Order." The literal translation of the Shona word "Murambatsvina," however, is "clear the filth or dirt." HUMAN RIGHTS WATCH, CLEAR THE FILTH: MASS EVICTIONS AND DEMOLITIONS IN ZIMBABWE 1 n.1 (2005), available at <http://www.hrw.org/backgrounder/africa/zimbabwe0905/zimbabwe0905.pdf> [hereinafter CLEAR THE FILTH].

2. Anna Kajumulo Tibaijuka, Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and impact of Operation Murambatsvina by the U.N. Special Envoy on Human Settlements Issues in Zimbabwe 12 (2005), http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf.

3. *Id.*

4. *Id.* at 7.

5. *Id.* at 12.

6. *Id.* at 13.

Demolition crews cut a swath through shanty towns and informal markets with bulldozers and torches.⁷ Every major city in Zimbabwe was targeted, and almost no area designated as "urban" was spared.⁸ In all, Murambatsvina resulted in the forced eviction of 700,000 people – six percent of the country's total population.⁹

The Zimbabwean government, led by President Robert Mugabe and his political party ZANU-PF,¹⁰ justified the Operation by arguing that it was "aimed at restoring order and sanity."¹¹ Officials claimed that the bulldozing and forced evictions were necessary to stop disorderly and chaotic urbanization, illicit trade in foreign currency, and environmental damage caused by inappropriate urban agricultural practices.¹² Human rights groups and the opposing political party, Movement for Democratic Change ("MDC"), however, contended that the Operation was the result of more sinister motives. Those organizations argued that the systematic program of evictions and property destruction was an act of retribution against the urban strongholds of political opposition to Mugabe.¹³ Many observers also expressed the view that Murambatsvina was a preemptive measure designed to prevent mass uprisings due to squalid housing conditions, food insecurity, and unemployment.¹⁴ Finally, economists and activists argued that, insofar as the program was aimed at unlicensed businesses, it may have been an effort by the Zimbabwean government to regain control over the national economy, thereby returning the country to a system of political patronage overseen by ZANU-PF officials.¹⁵

Sadly, Murambatsvina is typical of the human rights abuses that plague Africa.¹⁶ For that reason, the Operation is a useful case study for assessing the legality of humanitarian intervention to halt such abuses under applicable regional and international

7. *Id.* at 12.

8. *Id.*

9. CLEAR THE FILTH, *supra* note 1, at 1 (quoting Zimbabwe National Television address of May 20, 2005).

10. *Id.* at 7, 19.

11. *Id.* at 14 (quoting Zimbabwe National Television address of May 20, 2005).

12. Tibaijuka, *supra* note 2, at 20.

13. CLEAR THE FILTH, *supra* note 1, at 14.

14. *Id.* at 1, 7; Tibaijuka, *supra* note 2, at 24.

15. Tibaijuka, *supra* note 2, at 24; *see* CLEAR THE FILTH, *supra* note 1, at 14.

16. Amnesty International, Report on Africa 2009, <http://thereport.amnesty.org/en/regions/africa> (last visited June 12, 2009).

frameworks. The Constitutive Act of the African Union ("Constitutive Act") allows armed intervention to address "grave circumstances, namely: war crimes, genocide and crimes against humanity" ¹⁷ Although the U.N. Charter's general prohibition on the unauthorized use of force usually precludes purely humanitarian intervention in the internal affairs of a sovereign state, ¹⁸ the countries that make up the African Union have consented to such intrusions. ¹⁹ Therefore, prior approval by the U.N. Security Council will not be required to legitimize armed interventions authorized pursuant to the Constitutive Act.

It remains to be seen whether the states that comprise the African Union—many of which are impoverished and unstable—have the resources and political will to effectively halt humanitarian crises through the use of force. Even in light of concerns over its practical effectiveness, though, the African Union framework for humanitarian intervention is a promising step in the evolution of international law from a system premised on state sovereignty to one primarily concerned with guaranteeing the rights of individuals.

II. HUMAN RIGHTS VIOLATIONS .

Whatever the motivations behind Murambatsvina, it is beyond question that the forced evictions and destruction of property involved in the Operation constituted massive and deliberate human rights violations. ²⁰ Murambatsvina was carried out "in an indiscriminate and unjustified manner, with indifference to human suffering, and, in repeated cases, with disregard to several provisions of national and international legal frameworks." ²¹ In fact, many human rights advocates and scholars contend that the violations committed during Murambatsvina rose to the level of crimes against humanity. ²²

17. Constitutive Act of the African Union art. 4(h), July 11, 2000, http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm [hereinafter *Constitutive Act of the African Union*].

18. See U.N. Charter, art. 2, para. 4.

19. See *Constitutive Act of the African Union*, *supra* note 17.

20. Tibaijuka, *supra* note 2, at 62; see generally *CLEAR THE FILTH*, *supra* note 9.

21. See Tibaijuka, *supra* note 2, at 7.

22. *Id.* at 64.

A. National Human Rights Frameworks

By indiscriminately bulldozing shantytowns without giving effective notice or providing residents sufficient opportunity to comply with housing statutes, the Zimbabwean government violated its own laws. The Regional Town and Country Planning Act, the very law that the government claimed it was enforcing by destroying illegal dwellings and structures, requires that residents be served with notice in the form of an "enforcement order" and given one month to either appeal or come into compliance before action can be taken to eliminate unlicensed structures.²³ No individualized notice was given to residents during the Operation.²⁴ On the contrary, the City of Harare issued a general enforcement order on May 24, 2005, which explicitly stated that no action would be taken until June 20, 2005.²⁵ In direct violation of that order and the statutory requirement that citizens be given an opportunity to appeal, the government began bulldozing a few days before issuing the enforcement order.²⁶ In areas outside Harare, no official notice of the impending evictions was ever issued – residents learned of the Operation from the sound of bulldozers bearing down on their homes.²⁷

The implementation of Murambatsvina violated not only national statutory law, but also Zimbabwe's Constitution. Chapter III of the Constitution includes a Declaration of Rights, which provides that "[n]o person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe and immunity from expulsion from Zimbabwe."²⁸ During Murambatsvina, however, many evictees were forced to board trucks that transported them to rural outposts where they were detained against their will.²⁹ Rather than attempt to legally justify the forced displacement of its citizens

23. Regional Town and Country Planning Act, [29:12] § 32(3) (1998) (Zimb.) (subjecting enforcement orders to a 30-day waiting period before the government can act to clear illegal buildings or structures).

24. See Tibaijuka, *supra* note 2, at 58.

25. *Id.* (citing Zimbabwe Herald, May 24, 2005).

26. *Id.*

27. *Id.*

28. ZIMB. CONST. § 22(1), available at <http://www.parlzim.gov.zw/cms/UsefulResources/ZimbabweConstitution.pdf>.

29. Tibaijuka, *supra* note 2, at 63.

from urban settlements to rural work camps, the government simply stated "that all Zimbabweans have a rural home, and that all those who have been evicted should return to their rural homes",³⁰

Murambatsvina was also a direct violation of the Zimbabwean Constitution's guarantee against the arbitrary deprivation of property. The Constitution clearly states that government seizure of property is permissible only when the authority acquiring or destroying such property gives reasonable notice of its intent to do so, allows time for the owner of the property to contest the acquisition by appeal to the courts, and pays fair compensation.³¹ The authorities carrying out the Operation did not follow those procedural safeguards. Instead, they seized or destroyed property in urban areas without providing notice or opportunity to appeal and without paying any compensation whatsoever.³²

B. Regional Human Rights Frameworks

Zimbabwe is a member of the African Union and a party to the African Charter on Human and Peoples' Rights ("ACHPR").³³ The ACHPR grants African Union citizens rights such as freedom of movement,³⁴ inviolability of property,³⁵ and access to "the best attainable state of physical and mental health."³⁶ The implementation of Murambatsvina violated those rights. As discussed above, the Zimbabwean government infringed on its citizens' freedom of movement by forcibly relocating them to rural

30. *Id.*

31. ZIMB. CONST., ch. III, § 16(b)-(d).

32. See Tibaijuka, *supra* note 2, at 59.

33. African Union, List of Countries which have Signed, Ratified/Accessed to the African Charter on Human and Peoples' Rights, <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>.

34. ORGANIZATION OF AFRICAN UNITY (OAU) ASSEMBLY OF THE HEADS OF STATE AND GOVERNMENT, AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 12(1) [hereinafter AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS] ("Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.").

35. *Id.* at art. 14 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

36. *Id.* at art. 16(1).

camp³⁷. In direct contravention of the ACHPR's provision regarding the inviolability of property,³⁸ the Mugabe government summarily destroyed the homes and businesses of hundreds of thousands of Zimbabweans.³⁹ Left with no shelter or financial resources, thousands of individuals suffering from HIV/AIDS and other diseases were cut off from effective treatment, thereby violating their right to the best attainable state of physical and mental health.⁴⁰

C. International Human Rights Frameworks

Zimbabwe is also a party to a number of international human rights treaties.⁴¹ It ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR") in 1991.⁴² That document states in Article 11(1) that "[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."⁴³

The Council on Economic, Social and Cultural Rights ("CESCR"), which is charged with enforcing and clarifying the rights contained in the ICESCR,⁴⁴ ruled in General Comment Number 4 that "forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances"⁴⁵ The right to be free from forcible evictions such as those in Murambatsvina was reaffirmed in General Comment Number 7, when the CESCR unequivocally

37. Tibaijuka, *supra* note 2, at 63.

38. AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS, *supra* note 34, art. 14.

39. Tibaijuka, *supra* note 2, at 7.

40. *Id.* at 39-41, 56-57.

41. See, e.g., U.N. Office of the High Commissioner for Human Rights, Status by Country, Zimbabwe, <http://www.unhchr.ch/tbs/doc.nsf/newhvstatusbycountry?OpenView&Start=1&Count=250&Expand=196#196>.

42. *Id.* at <http://www.unhchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a2a0027ba1e/80256404004ff315c125638b005e5ae2?OpenDocument>.

43. G.A. Res. 2200A (XXI), art. 11(1), U.N. Doc. A/6546 (Dec. 16, 1966).

44. See International Covenant on Economic, Social and Cultural Rights art. 21-22, Dec. 16, 1966, 993 U.N.T.S. 3, <http://www.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR].

45. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment 4: The Right to Adequate Housing*, ¶ 18, U.N. Doc. E/1992/23 (Dec. 13, 1991).

stated that “[e]victions should not result in individuals being rendered homeless or vulnerable to violations of other human rights.”⁴⁶ The Council found that evictions are only permissible when residents are given individualized prior notice, information on the government’s proposed use of the land, and an opportunity to invoke legal remedies to halt the seizure of their homes.⁴⁷

In 1995, Zimbabwe submitted its initial state report to the CESCR, which highlighted the country’s housing crisis.⁴⁸ While the report argued that no domestic legislation prohibited forced evictions – despite the aforementioned provisions of the Regional Town and Country Planning Act – Zimbabwe acknowledged that the only permissible remedies dealing with “illegal” settlements under the ICESCR are upgrading settlements or relocating individuals living in squatter colonies to planned residential sites.⁴⁹ In its response to Zimbabwe’s state report, the CESCR specifically stated that any forced evictions undertaken without providing notice and alternative housing would violate the Covenant and General Comment Number 4.⁵⁰

By forcibly evicting residents of urban settlements during Murambatsvina, Zimbabwe violated its obligations under the ICESCR.⁵¹ Except for the ineffective and generic notice given in Harare, the government did not warn evicted individuals of the impending destruction of their homes and property,⁵² nor did the government provide alternative accommodations for evicted

46. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights [CESCR], *General Comment No. 7: The Right to Adequate Housing (art. 11.1)*, ¶ 17, U.N. Doc. E/1998/22, Annex IV (May 14, 1997).

47. *Id.* ¶ 16.

48. U.N. Econ. & Soc. Council [ECOSOC], *Implementation of the International Covenant on Economic, Social and Cultural Rights*, ¶ 100, U.N. Doc. E/1990/5/Add.28 (Sept. 25, 1995) [hereinafter *Covenant on Rights*].

49. *Id.* ¶ 116.

50. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights [CESCR], *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant*, ¶ 21, U.N. Doc. E/C.12/1/Add.12 (May 20, 1997) [hereinafter *Consideration of Reports*].

51. Tibaijuka, *supra* note 2, at 59-62.

52. The notice given in Harare was published on May 24, 2005, and stated that evictions would not commence until June 20th of that year. In direct contradiction of that statement, and in violation of the 30-day notice period required by the Regional Town and Country Planning Act, the government began demolitions a few days before it issued the notice. *Id.* at 58.

residents.⁵³ In fact, the evictions rendered 700,000 Zimbabweans homeless.⁵⁴ The Zimbabwean government gave no opportunity for legal appeal, and the national court system was notoriously unresponsive to efforts by activists seeking injunctions to stop bulldozing after it had begun.⁵⁵

D. Were Murambatsvina's Violations Crimes Against Humanity?

Numerous human rights advocates and scholars contend that the Zimbabwe committed crimes against humanity by implementing the Operation.⁵⁶ The Rome Statute of 1998, which established the International Criminal Court, contains the most authoritative definition of "crimes against humanity" found in modern international law.⁵⁷ Article 7 of the Rome Statute defines "crimes against humanity" as including the (1) "[d]eportation or forcible transfer of population"⁵⁸; (2) "[p]ersecution against any identifiable group or collectivity on political . . . or other grounds that are universally recognized as impermissible under international law . . ."⁵⁹; and (3) "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" when those inhumane acts are "committed as part of a widespread or systematic attack directed against any civilian population . . ."⁶⁰

A U.N. Special Envoy, sent by then-Secretary-General Kofi Annan to investigate the Operation, engaged in only a cursory analysis of possible criminal responsibility in her report and specifically noted that the issue was beyond her mandate.⁶¹ The Envoy went on to express her view that a debate on criminality "would serve only to distract the attention of the international community from focusing on the humanitarian crisis facing the

53. *See id.*

54. *Id.* at 64.

55. *See id.* at 12, 60.

56. *See, e.g., id.* at 64.

57. *See* Rome Statute of the International Criminal Court art. 7, July 17, 1998, U.N. Doc. 32/A/Conf. 183/9, 37 I.L.M. 1002, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; *see also* Geoffrey Robertson, *Jurisdiction of the International Criminal Court*, CENTER ON LAW & GLOBALIZATION, 2006, http://clg.portalxm.com/library/keytext.cfm?keytext_id=124.

58. Rome Statute, *supra* note 57, art. 7(1)(d).

59. *Id.* at art. 7(1)(h).

60. *Id.* at art. 7(1)(k), 7(1).

61. Tibaijuka, *supra* note 2, at 2, 64-67.

displaced who need immediate assistance.”⁶² The Envoy’s report did, however, touch briefly on the issue of whether the government’s actions had triggered criminal liability by forcibly evicting citizens from urban townships and clearing shantytowns.⁶³ While tentatively concluding that it would be difficult to sustain a case against Zimbabwe for crimes against humanity, the Envoy emphasized four factors in her report: (1) the unlawful nature of the structures that were demolished; (2) the fact that some individuals were not “forcibly expelled” from their land but rather chose to remain, even after their homes had been demolished and possessions destroyed; (3) the general principle of international law that permits states to derogate human rights in emergency situations; and (4) the housing crisis and economic hardship faced by Zimbabwe, which presented the defense of a lack of criminal intent by government officials.⁶⁴

The U.N. Special Envoy’s analysis relating to crimes against humanity is flawed. First, the Envoy only addressed whether the Zimbabwean government committed “deportation or forcible transfer of population” or “other inhumane acts”; her report made no finding as to whether the Zimbabwean government violated the Rome Statute’s prohibition of systematic “persecution against any identifiable group” on the basis of political views.⁶⁵ Additionally, the Envoy determined that Murambatsvina did not involve crimes against humanity because “some people demolished their own structures out of fear, the threat of hefty fines, or to salvage building materials” while “there were others, who, after demolitions, chose to remain on their demolished property, making it difficult to make a case for systematic forced expulsion.”⁶⁶ That finding failed to take into account the coercive forces acting on evicted residents and the full definition of “persecution” contained in the Rome Statute, which states that “[p]ersecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”⁶⁷

62. *Id.* at 66.

63. *Id.* at 65-66.

64. *Id.*

65. *See id.*; Rome Statute, *supra* note 57, art. 7(2)(h).

66. Tibaijuka, *supra* note 2, at 65.

67. Rome Statute, *supra* note 57, art. 7(2)(h).

As previously discussed, the forcible evictions and destruction of property that occurred during Operation Murambatsvina deprived hundreds of thousands of individuals of their rights to unfettered possession of property, freedom of movement, and the highest attainable standard of physical and mental health.⁶⁸ Murambatsvina destroyed people's homes and livelihoods,⁶⁹ forcing them to live in the open during the onset of winter⁷⁰ and cutting off access to health care for many evictees who suffered from HIV/AIDS and other diseases.⁷¹ The widespread and systematic nature of the Operation, its egregious violations of human rights, and its alleged use by the Mugabe government as a retributive tool against the political opposition inescapably lead to the conclusion that Murambatsvina constituted "persecution" against an identifiable political group.⁷² Thus, Zimbabwe committed crimes against humanity by implementing the Operation.

Finally, the U.N. Special Envoy failed to adequately address the question of whether Murambatsvina involved crimes against humanity in the form of "[o]ther inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health."⁷³ As predicted by the Envoy in her report, the evictions involved in the Operation resulted in overcrowding, food shortages, and lack of health care for evictees.⁷⁴ The effects were especially severe for children, pregnant mothers, and individuals living with HIV/AIDS or other diseases.⁷⁵ Even in the relatively short time between the commencement of Murambatsvina and the Envoy's fact-finding mission, reports emerged of deaths caused by

68. Tibaijuka, *supra* note 2, at 56, 62-63. The U.N. Special Envoy specifically found that these rights, contained in the ICESCR, had been violated. The report stated that Operation Murambatsvina caused the homelessness and loss of livelihood of 700,000 people, "caus[ing] them to suffer in large numbers." *Id.* at 64. In light of those findings, the U.N. Envoy's refusal to characterize the Zimbabwean government's actions as "crimes against humanity" appears to have been motivated more by political concerns than by a strict interpretation of applicable legal standards. *See id.* at 64-65.

69. *Id.* at 7.

70. The U.N. Special Envoy noted that many displaced individuals are likely to become ill or die from exposure to the elements. *See id.* at 34, 36.

71. *See id.* at 39-41.

72. *See id.* at 20, for more information on the motivation behind Operation Murambatsvina.

73. Rome Statute, *supra* note 57, art. 7(1)(k).

74. Tibaijuka, *supra* note 2, at 37-39.

75. *Id.* at 38-40.

exposure and diseases, such as pneumonia and tuberculosis.⁷⁶ Those deaths were an inevitable result of destroying the homes of hundreds of thousands of people, many of whom were known from previous reports to be infected with diseases such as tuberculosis and HIV/AIDS, without providing adequate housing alternatives.⁷⁷ Zimbabwe's clearing of shantytowns was an intentional and systematic program, and it was known that such a program would cause great suffering to those left homeless.⁷⁸ Consequently, the Mugabe government's actions in perpetrating Operation Murambatsvina were comprised of "inhumane acts" that "intentionally caus[ed] great suffering,"⁷⁹ and rose to the level of crimes against humanity.⁸⁰

III. HUMANITARIAN INTERVENTION FRAMEWORKS

Like other humanitarian crises, Zimbabwe's commission of crimes against humanity during Operation Murambatsvina raises the paradoxical question of how state sovereignty should be reconciled with the enforcement of human rights. The Operation, however, is distinguished from past abuses in which a state engaged in widespread and systematic violations of the human rights of its citizens – such as the Rwandan genocide of 1994 – by the fact that Zimbabwe, at the time of Murambatsvina, was subject to an enforcement mechanism permitting outside actors to forcibly intervene in its internal affairs to halt its actions.⁸¹ That mechanism, which is codified in Article 4(h) of the Constitutive Act of the African Union,⁸² represents a transformational shift in international law from a system premised on the inviolable sovereignty of states to one in which the rights of individuals are paramount.

76. *Id.* at 38.

77. *Id.* at 38-41.

78. *See id.* at 12-13.

79. *Id.* at 65.

80. Rome Statute, *supra* note 57, art. 7(1)(k).

81. African Union, List of Countries Which Have Signed, Ratified/Accessed to the Constitutive Act of the African Union, <http://www.africa-union.org/root/au/Documents/Treaties/List/Constitutive%20Act%20of%20the%20African%20Union.pdf> [hereinafter Constitutive Act List of Countries]; Constitutive Act of the African Union, *supra* note 17, art. 4(h).

82. Constitutive Act of the African Union, *supra* note 17, art. 4(h).

The humanitarian intervention mechanism contained in the Constitutive Act of the African Union is limited, however, by two factors. First, any intervention must comply with the terms of the U.N. Charter.⁸³ Arguably more significant are the political and practical constraints under which the mechanism operates.⁸⁴ It remains to be seen whether the states that make up the African Union possess the political will and military clout to effectively intercede in human rights crises. Even in light of its limitations, however, the enforcement mechanism contained in the Constitutive Act of the African Union is a promising step toward a model of humanitarian intervention capable of ensuring the human rights of many of the world's most vulnerable citizens.

A. African Union Humanitarian Intervention Frameworks

The African Union was established by the Constitutive Act on July 11, 2000.⁸⁵ Article 4(h) of that document allows "the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."⁸⁶ Thus, the Constitutive Act lays the foundation for humanitarian interventions to halt egregious human rights abuses.

Two years after ratifying the Constitutive Act, the African Union took its first steps toward creating a procedural structure for implementing the enforcement mechanism contained in Article 4(h) by establishing a Peace and Security Council ("PSC" or "the Council") for the dual purpose of (1) recommending humanitarian intervention in cases of "grave circumstances" such as war crimes, genocide, and crimes against humanity;⁸⁷ and (2) overseeing

83. See U.N. Charter, *supra* note 18, art. 103.

84. See, e.g., African Union, Peace and Security Council, *Communiqué of the Twelfth Meeting of the Peace and Security Council*, Doc. PSC/MIN/Comm.(XII) (July 4, 2004) [hereinafter *Communiqué of the Twelfth Meeting of the Peace and Security Council*]; African Union, Decision on Darfur, Doc. Assembly/AU/Dec.54(III) (July 2004).

85. See Constitutive Act of the African Union, *supra* note 17.

86. *Id.* at art. 4(h).

87. Protocol Relating to the Establishment of the Peace and Security Council of the African Union art. 7(e), July 9, 2002, http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol_peace%20and%20security.pdf ("[T]he Peace and Security Council shall recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments.").

subsequent military and reconstructive efforts.⁸⁸ The PSC functions as a regional equivalent to the U.N. Security Council by designating threats or “grave circumstances” and authorizing the use of force to address those threats.⁸⁹

The PSC is made up of 15 Members⁹⁰ who are elected based on “the principle of equitable regional representation and rotation”⁹¹ It meets on a continuing basis and is required to hold meetings at least twice per month, making it more capable of responding quickly to humanitarian crises than the African Union Assembly (which meets only once each year).⁹² In any meeting of the PSC, two-thirds of the members are required to form a quorum, and a two-thirds majority of any quorum is needed to authorize action.⁹³ Unlike the U.N. Security Council, no member is given a permanent seat or veto.⁹⁴

1. Determination of “Grave Circumstances”

The Protocol that established the PSC grants that body the power to “recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, intervention, on behalf of the Union, in a Member State in respect of grave circumstances, namely war crimes, genocide and crimes against humanity, as defined in relevant international conventions and instruments[.]”⁹⁵ Implicit in

88. *Id.* at art. 6 (“The Peace and Security Council shall perform functions in the following areas . . . (d) peace support operations and intervention, pursuant to article 4 (h) and (j) of the Constitutive Act; (e) peace-building and post-conflict reconstruction; (f) humanitarian action and disaster management.”).

89. *See id.*

90. *See id.* at art. 5(1).

91. *Id.* at art. 5(2). A number of other criteria are specified in Article 5(2) for use in electing Members. Under Article 5(3) of the Protocol establishing the PSC, state representatives are eligible for immediate reelection at the expiration of their term. These two factors result in a partially merit-based system whereby a state with an outstanding record of adherence to human rights and the principles contained in Article 4 of the Constitutive Act could, theoretically, retain a seat on the PSC as long as the other African Union Member States recognized those accomplishments and continued to grant a seat in appreciation.

92. *See id.* at art. 8(1), art. 8(2); *see also* Constitutive Act of the African Union, *supra* note 17, art. 6(3).

93. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 8(8), (13).

94. *Id.* at art. 5, 8(13); U.N. Security Council Members, <http://www.un.org/sc/members.asp>.

95. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 7(1)(e).

this reporting function is the duty to apply the definitions contained in "relevant international conventions and instruments,"⁹⁶ to the actions of member states in order to determine whether those actions give rise to "grave circumstances." Thus, the PSC serves as an adjudicator of international law.

The PSC's function of designating "grave circumstances" is similar to the U.N. Security Council's power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression"⁹⁷ However, in an apparent response to the latter body's inability to react quickly in previous humanitarian crises, the PSC is designed for swift action aimed at halting abuse before it can lead to large-scale loss of life or property. The Protocol that established the PSC specifically states that it should "anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity"⁹⁸ by using a strategy of "early responses to contain crisis situations"⁹⁹ In order to make the anticipation of humanitarian crises possible, the Protocol that established the PSC requires that it create a "Continental Early Warning System"¹⁰⁰ and "develop an early warning module based on clearly defined and accepted political, economic, social, military and humanitarian indicators, which shall be used to analyze developments within the continent and to recommend the best course of action."¹⁰¹ The aforementioned provisions grant the PSC two powers that the U.N. Security Council has never exercised: (1) rather than waiting for conflicts to develop before authorizing intervention, the PSC may use anticipatory force to avoid future conflicts;¹⁰² and (2) rather than responding to threats on an *ad hoc* basis, the PSC may develop a "module" that would

96. As previously mentioned, the most authoritative definitions of "war crimes," "genocide," and "crimes against humanity" are contained in the Rome Statute, *supra* note 57, art. 6-8.

97. U.N. Charter, *supra* note 18, art. 39.

98. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 7(1)(a).

99. *Id.* at art. 4(b).

100. *Id.* at art. 12(1).

101. *Id.* at art. 12(4). At the time of writing, the PSC had not yet established a standardized "module" as to what actions constitute "war crimes," "genocide," or "crimes against humanity."

102. *Id.* at art. 12.

include standardized response contingencies in which certain actions would automatically give rise to "grave circumstances."¹⁰³

In developing a module for designating future abuses as "grave circumstances," the PSC is likely to be guided by decisions of the Court of Justice of the African Union ("CJAU"). Under African Union protocols, the CJAU has jurisdiction over all disputes relating to "the interpretation and application of the [Constitutive] Act"¹⁰⁴ or "any question of international law"¹⁰⁵ and may give an advisory opinion on "any legal question at the request of . . . the Peace and Security Council"¹⁰⁶ Consequently, the CJAU has the power to determine whether a given state's actions constitute genocide, war crimes, or crimes against humanity as defined by the Rome Statute. Decisions by the CJAU may provide direct guidance in cases where they are rendered before the PSC decides whether to authorize intervention. However, given the exigent nature of the "grave circumstances" in which intervention is proper (all of which involve irreparable loss of life and property) and the delays inherent in adjudicating disputes, it is more likely that past CJAU rulings regarding separate but analogous humanitarian crises will be used as precedent for determining whether a state's actions justify intervention. As the CJAU develops a more and more comprehensive body of case law relating to humanitarian crises, its decisions may form the basis for an increasingly sophisticated PSC contingency plan outlining whether intervention is appropriate.

The CJAU never addressed the issue of whether Murambatsvina constituted crimes against humanity. Indeed, since Zimbabwe had not ratified the Protocol that created the Court at the time of the Operation, it had no jurisdiction over the state's actions.¹⁰⁷ On the other hand, Zimbabwe had acceded to the

103. *Id.* at art. 7(e).

104. Protocol of the Court of Justice of the African Union, art. 19(1)(a), July 11, 2003, <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf>.

105. *Id.* at art. 19(1)(c).

106. *Id.* at art. 44(1).

107. *Id.* at art. 18(3) ("The Court shall have no jurisdiction to deal with a dispute involving a Member State that has not ratified this Protocol."); African Union, List of Countries Which Have Signed, Ratified/Acceded to the Protocol of the Court of Justice of the African Union, <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Court%20of%20Justice.pdf>.

Constitutive Act and the Protocol establishing the PSC.¹⁰⁸ Therefore, the PSC could have independently determined whether Zimbabwe's actions in perpetrating Murambatsvina constituted crimes against humanity.¹⁰⁹

2. Recommendation of Humanitarian Intervention

After determining that a state's actions constitute genocide, war crimes, or crimes against humanity, the PSC may recommend forcible intervention in that country to the African Union Assembly, which may then authorize military action.¹¹⁰ The Assembly is required to meet only once a year, and the PSC does not have the explicit authority to call an extraordinary session to debate a recommended intervention.¹¹¹ However, it could effectively do so by advancing a motion through one of the PSC member states that voted in favor of recommending intervention.¹¹² After a motion is advanced, an extraordinary session of the Assembly will be held if two-thirds of African Union member states agree to do so.¹¹³ Since the threshold for obtaining an extraordinary session of the Assembly – a two-thirds vote of the member states – is the same as the one for approving a recommended intervention,¹¹⁴ it is likely that military force will be authorized in nearly all cases where the procedural hurdle of obtaining an extraordinary session is cleared. Conversely, a vote against holding an extraordinary session may be a means of opposing intervention while avoiding the political repercussions that would stem from publicly tolerating the abuse in question.

108. Constitutive Act List of Countries, *supra* note 81; African Union, List of Countries Which Have Signed, Ratified/Acceded to the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, <http://www.africa-union.org/root/au/Documents/Treaties/List/Peace%20and%20Security%20Protocol.pdf>.

109. See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 7(1).

110. *Id.* at art. 7(1)(e); Constitutive Act of the African Union, *supra* note 17, art. 4(h).

111. See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 8(8), (13); Constitutive Act of the African Union, *supra* note 17, art. 6(3).

112. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 8(8), (13). Two-thirds of the 15 PSC members are required to form a quorum, and a two-thirds vote of any quorum is required to recommend intervention. Therefore, at least seven states must vote in favor of intervention to make a recommendation to the Assembly.

113. Constitutive Act of the African Union, *supra* note 17, art. 6(3).

114. See *id.* at art. 7(1).

Once the Assembly approves a humanitarian intervention, the PSC is charged with overseeing the planning and execution of military operations, along with post-conflict reconstruction efforts.¹¹⁵ To aid in that task, African Union treaties provide for an "African Standby Force" comprised of military units from the member states.¹¹⁶ In addition to combat troops, the African Standby Force will consist of a Military Staff Committee made up of senior military officers, which will advise the PSC regarding regional conflicts and potential interventions.¹¹⁷ If humanitarian intervention is recommended by the PSC and authorized by the Assembly, states that have contributed troops to the African Standby Force will be required to place those units at the disposal of commanders appointed by the PSC for the duration of peacekeeping activities.¹¹⁸

Treaty provisions laying the groundwork for the African Standby Force represent an effort to solve one of the problems that has plagued the U.N. Security Council since its inception: the lack of any independent military capability to enforce its decisions.¹¹⁹ As of yet, however, no African Union member state has contributed troops to the Standby Force, and no Military Staff Committee has been established.¹²⁰ Whether African Union member states will cede control of their military units to a regional body, and whether the PSC can establish command and control mechanisms that are sufficiently flexible to respond quickly to

115. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, *supra* note 87, art. 3(b)-(c), 6(d).

116. *Id.* at art. 13.

117. *Id.* at art. 13(8)-(12).

118. *Id.* at art. 13(6)-(7), (17) (discussing chain of command and troop contribution requirements).

119. See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 24-31 (2002) [hereinafter *RECOURSE TO FORCE*]. Article 43 of the U.N. Charter calls for a similar military establishment. Member States were called upon to make military units available pursuant to agreements that were to be negotiated on the Security Council's initiative. No agreements were ever negotiated, though, and the Security Council has been forced to rely on *ad hoc* forces put together for specific missions or the armed forces of willing Member States in order to enforce its decisions.

120. See Vanessa Kent & Mark Malan, *The African Standby Force: Progress and Prospects*, 12(3) AFR. SEC. REV. 71, 72-73 (2003); see also JEFFERY E. MARSHALL, *BUILDING AN EFFECTIVE AFRICAN STANDBY FORCE TO PROMOTE AFRICAN STABILITY, CONFLICT RESOLUTION AND PROSPERITY* 5 (Crisis States Research Centre Apr. 2009), available at <http://www.crisisstates.com/download/dp/dp16.pdf>.

humanitarian crises while maintaining effective oversight of military operations, remains to be seen.

Even if the African Standby Force is never established, humanitarian interventions could be carried out by using *ad hoc* forces under the command of the PSC or by authorizing willing states to intercede on behalf of the African Union. Under such a model, the African Union would operate in much the same manner as the U.N. Security Council has done for the past 65 years.¹²¹ The Constitutive Act grants the African Union the right of humanitarian intervention, but not the various member states.¹²² That system is analogous to the collective security structure laid out in the U.N. Charter, which grants the Security Council – not the individual member states – the power to use force in the event that it finds the existence of a “threat to the peace, breach of the peace, or act of aggression”¹²³ The practice of the U.N. Security Council, however, has been to authorize willing states to use force on its behalf.¹²⁴ In the event that the Security Council finds a threat to peace, it authorizes willing member states to “use all necessary means” to address that threat.¹²⁵

The African Union Assembly could act similarly by authorizing willing states to use all means necessary to halt genocide, war crimes, or crimes against humanity committed by any member state prior to the establishment of the African Standby Force. In fact, nothing in the Constitutive Act or other African Union treaties prohibits the Assembly from authorizing intervention by states outside the African Union.¹²⁶ The Constitutive Act enumerates “the right of the [African] Union to intervene in a Member State pursuant to a decision of the

121. See S.C. Res. 83, U.N. Doc S/1511 (June 27, 1950) (authorizing the use of force in the Korean War by recommending “that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/0678 (Nov. 29, 1990) (authorizing the use of force in “Operation Desert Storm” by requesting that Member States “use all necessary means” to reverse Iraqi aggression against Kuwait).

122. Constitutive Act of the African Union, *supra* note 17, art. 4(h) (enumerating “the right of the [African] Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances.”) (emphasis added).

123. U.N. Charter, *supra* note 18, art. 39, 42.

124. See, e.g., S.C. Res. 678, *supra* note 121; S.C. Res. 83, *supra* note 121.

125. S.C. Res. 678, *supra* note 121.

126. See, e.g., Constitutive Act of the African Union, *supra* note 17.

Assembly in respect of grave circumstances”¹²⁷ but places no limits on the military forces used to effectuate that intervention. Thus, if the Constitutive Act is interpreted in the same manner as the U.N. Charter – as allowing the Assembly to authorize individual states to use force in carrying out its directives rather than acting on its own behalf – the Assembly may overcome the obstacle to intervention posed by the limited military resources of African Union states by allowing forces from more powerful countries to address human rights abuses. While authorizing outside countries to forcibly intervene within an African Union state may be criticized on the grounds that it erodes the sovereignty of African nations, such concerns are largely alleviated by the procedural requirement that two-thirds of African Union member states must vote in favor of intervention to authorize such an action.¹²⁸ Given that hurdle, intervention will likely be allowed only in cases of the most universally-recognized and egregious human rights abuses – exactly the circumstances in which swift action, whether it comes from inside or outside of the African Union, will be most needed.¹²⁹

3. Amendments to Article 4(h)

A mere three years after adopting the Constitutive Act, the African Union promulgated a Protocol that amended the

127. *Id.* at art. 4(h).

128. *Id.* at art. 4(h), 7.

129. The ongoing crisis in the Darfur region of Sudan illustrates the high threshold for humanitarian intervention under African Union frameworks, along with the continuing lack of political will necessary to undertake such actions. Despite widespread reports of systematic violence in which the Sudanese government utilized local militia to end a rebellion by terrorizing the population of that region, the PSC refused to recommend humanitarian intervention in 2004. The PSC found that “even though the crisis in Darfur is grave, with unacceptable level of deaths, human suffering and destructions of homes and infrastructure, the situation cannot be defined as a genocide.” *Communiqué of the Twelfth Meeting of the Peace and Security Council*, *supra* note 84, ¶ 2. That decision was echoed by the African Union Assembly in July of that year. African Union, Decision on Darfur, ¶ 2, Doc. Assembly/AU/Dec.54(III) (July 2004). Neither body addressed the question of whether Sudan’s actions constituted war crimes or crimes against humanity. However, in March 2009, the International Criminal Court issued a warrant for the arrest of Sudanese President Omar Hassan Bashir in which it found that Sudan’s actions in Darfur included both war crimes and crimes against humanity, including “murder, extermination, forcible transfer, torture and rape.” *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>. It remains to be seen whether the African Union will act on that ruling by authorizing humanitarian intervention.

enforcement mechanism in Article 4(h) to allow for “the right of the [African] Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council[.]”¹³⁰ Thus, the amended version of Article 4(h) expands the right of the African Union to intervene militarily in the internal affairs of a member state, which was previously limited to humanitarian crises involving genocide, war crimes, or crimes against humanity, to include a second option: a “serious threat to legitimate order.”¹³¹

The amended version of Article 4(h) closely resembles the original text proposed during debates on the Constitutive Act.¹³² That version was rejected due to concerns that providing a right of intervention to address situations that pose a “serious threat to legitimate order” without providing a definition of the terms “serious threat” and “legitimate order” would result in relativistic and selective enforcement, which would erode the general prohibitions on the use of force contained in both the Constitutive Act and the U.N. Charter.¹³³ Additionally, the inclusion of a right of intervention to restore “legitimate order” raises the possibility that the enforcement mechanism, though originally meant to address humanitarian crises, will be utilized by corrupt governments to squelch popular rebellions and political dissent.¹³⁴

The amendments to the Constitutive Act have not yet entered into force.¹³⁵ The current version of the enforcement mechanism

130. Protocol on Amendments to the Constitutive Act of the African Union art. 4(h), July 11, 2003, <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20Amendments%20to%20the%20Constitutive%20Act.pdf>.

131. *Id.*

132. Tiyanjana Maluwa, *The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?*, 98 AM. SOC'Y INT'L L. PROC. 232, 235 (2004).

133. *Id.* at 236. The terms “serious threat” and “legitimate order” are left wholly undefined by the Constitutive Act and the Protocol on Amendments to the Constitutive Act.

134. For an opposing viewpoint, see *id.* at 236-38 (arguing that a certain amount of ambiguity regarding the appropriateness of intervention may be desirable as a means of allowing the PSC discretion to make factual determinations on a case-by-case basis, rather than applying a bright-line rule that may be insufficiently adaptable to deal with future crises).

135. At the time of writing, 21 of the 53 African Union member states had ratified the Protocol on Amendments to the Constitutive Act. African Union, List of Countries that

contained in Article 4(h) of the Constitutive Act allows for military intervention only in humanitarian crises involving genocide, crimes against humanity, or war crimes.¹³⁶ Since the amended version of Article 4(h) simply adds a second set of circumstances in which military intervention may be permitted, the eventual adoption of that version will have no effect on the right of the African Union to authorize humanitarian intervention to halt genocide, war crimes, or crimes against humanity.

B. Humanitarian Intervention and the U.N. Charter

At first glance, the provisions of the Constitutive Act of the African Union that allow for humanitarian intervention appear to conflict with the U.N. Charter. The latter document contains a general prohibition on the use of force, which states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹³⁷ The U.N. Charter contains only two exceptions to that general prohibition: Article 51 allows for armed action in self-defense,¹³⁸ while Article 42 has been interpreted as allowing individual member states to use military force in order to address threats to international peace when

have Signed, Ratified/Accessed to the Protocol on Amendments to the Constitutive Act of the African Union, <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Amendments%20to%20the%20Constitutive%20Act.pdf>. Two thirds of the states in the African Union must ratify the Protocol before it will become effective. Constitutive Act of the African Union, *supra* note 17, art. 32(3).

136. Constitutive Act of the African Union, *supra* note 17, art. 4(h).

137. U.N. Charter, *supra* note 18, art. 2, para. 4.

138. *Id.* at art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”). Self-defense has long been understood to include the right to use anticipatory force to address the threat of an imminent attack that is “instant, overwhelming, [and] leaving no choice of means and no moment for deliberation.” That understanding was first articulated in the *Caroline* case – a dispute involving the sinking of an American ship by British forces in 1837 – and was applied after the adoption of the U.N. Charter by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8). See *RECOURSE TO FORCE*, *supra* note 119, at 97-98.

authorized by the U.N. Security Council.¹³⁹ The text of the U.N. Charter contains no provision allowing for humanitarian intervention in the internal affairs of a state – even in cases of egregious human rights violations such as genocide, war crimes, and crimes against humanity.¹⁴⁰ Many commentators have expressed concern that tolerating humanitarian interventions may erode the U.N. Charter's prohibition on the unilateral use of force, or result in relativistic enforcement of that prohibition that “could launch the international system down the slippery slope into an abyss of anarchy.”¹⁴¹

In addition to prohibiting the unauthorized use of force by U.N. member states, the U.N. Charter places strict constraints on military action by regional organizations. Article 53 of the U.N. Charter states that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council.”¹⁴² That prohibition is strengthened by Article 103, which mandates the supremacy of the U.N. Charter, stating that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present

139. U.N. Charter, *supra* note 18, art. 42 (“Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”). Article 42 has been interpreted to allow the Security Council to authorize the use of force by ad hoc forces made up of willing member states. RECOURSE TO FORCE, *supra* note 119, at 24; *see also* S.C. Res. 83, *supra* note 121 (authorizing member states to forcibly repel North Korean forces that had invaded South Korea); S/RES 678, *supra* note 121 (authorizing member states to forcibly remove Iraqi forces from Kuwait).

140. *See* RECOURSE TO FORCE, *supra* note 119, at 135-39. Over the past 20 years, there have been several attempts to justify the use of force for “purely humanitarian” purposes, the most famous being NATO’s 1999 intervention in Kosovo to stop the genocidal slaughter of ethnic Albanians residing in that country. That intervention – while widely considered to be morally legitimate – was later found to be illegal under the terms of the U.N. Charter. Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 164 (2000); *see also* RECOURSE TO FORCE, *supra* note 119, at 163-69 (discussing negotiations in the U.N. Security Council prior to the intervention, the military campaign, and its aftermath).

141. RECOURSE TO FORCE, *supra* note 119, at 171-72. *See* Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005) and Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L. L. 607 (2003), for discussion on the erosion of the prohibition on force.

142. U.N. Charter, *supra* note 18, art. 53, para. 1.

Charter shall prevail.”¹⁴³ Every state in the African Union is also a member of the United Nations.¹⁴⁴ Thus, any humanitarian intervention pursuant to Article 4(h) of the Constitutive Act of the African Union must comply with the terms of the U.N. Charter’s prohibition of the unauthorized use of force.

The provisions of the U.N. Charter prohibiting the use of force by member states or regional organizations do not, however, necessarily require that the U.N. Security Council approve in advance any humanitarian intervention authorized by the African Union. To the contrary, it is well-established that Security Council authorization is not a prerequisite for the use of force in cases where a state consents to armed intervention in its internal affairs.¹⁴⁵ Almost 65 years of U.N. practice with respect to peacekeeping forces serves as an example of that principle.

Beginning in 1950 with the “Uniting for Peace” resolution, the U.N. General Assembly has attempted to address gridlock in the Security Council – usually due to the use of the veto by one of the five permanent members to protect their political interests – by allowing the deployment of armed peacekeeping forces to consenting states.¹⁴⁶ Under that resolution, peacekeepers were dispatched without Security Council authorization in 1956 to address a conflict over the ownership of the Suez Canal¹⁴⁷ and in 1960 to combat a secessionist regime in the Congo.¹⁴⁸ The International Court of Justice upheld the legality of those actions, reasoning that although the U.N. Security Council has the “primary” responsibility for assuring international peace and security, the General Assembly has the right “by means of recommendations . . . to organize peace-keeping operations, at the

143. *Id.* at art. 103.

144. See United Nations Member States, <http://www.un.org/en/members/index.shtml> (last visited Mar. 23, 2010); Constitutive Act List of Countries, *supra* note 81.

145. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 230 (2d ed. 2004) (“It also seems to have been accepted after the experience of Yugoslavia and Somalia, that peacekeeping should generally be kept separate from Chapter VII actions” in which the U.N. Security Council authorizes the use of force to address threats to international peace and security.).

146. See *RECOURSE TO FORCE*, *supra* note 119, at 33-39. See Bryan D. Kreykes, *A Case for Delegation: The U.N. Security Council, Regional Conflicts, and Regional Organizations*, 11 *TOURO INT’L L. REV.* 1 (2008), for a discussion of Security Council gridlock and proposed initiatives to reform that body.

147. See G.A. Res. 1000 (ES-I), U.N. Doc. A/3354 (Nov. 5, 1956).

148. See G.A. Res. 1474 (ES-IV), U.N. Doc. A/4510 (Sept. 20, 1960).

request, or with the consent, of the States concerned.”¹⁴⁹ Emboldened by the Court’s holding, the General Assembly continued to deploy peacekeeping forces to consenting states throughout the Cold War. In all, 38 peacekeeping missions based on the consent of the state in which the intervention took place were authorized pursuant to the “Uniting for Peace” resolution during the U.N.’s first 50 years.¹⁵⁰

Since the end of the Cold War, U.N. peacekeeping missions have expanded in scope to include combat operations aimed at halting widespread human rights abuses such as genocide, war crimes, and crimes against humanity.¹⁵¹ That expansion was most dramatically demonstrated by UNPROFOR, a peacekeeping mission deployed to the former Yugoslav province of Bosnia-Herzegovina from 1993 to 1995.¹⁵² UNPROFOR’s mission was originally instituted at the request of the Yugoslav government.¹⁵³ Due to ongoing genocide perpetrated by the Serbian majority of Bosnia-Herzegovina against the country’s Muslim minority, however, the U.N. refused to abandon its peacekeeping mission even after Croatia, a former province of Yugoslavia that had since become an independent state, withdrew its consent to operations on its territory. Instead, the U.N. converted UNPROFOR into a more wide-ranging enforcement operation whose mandate included combat operations to halt the ongoing slaughter.¹⁵⁴

Like the aforementioned peacekeeping operations, humanitarian intervention pursuant to the Constitutive Act of the African Union may be based on the consent of the state in which the intervention takes place,¹⁵⁵ and therefore does not require the prior approval of the U.N. Security Council. By ratifying the Constitutive Act, each of the states in the African Union knowingly entered into an accord whereby they consented to armed intervention in their internal affairs to address genocide, war crimes, and crimes against humanity.¹⁵⁶ Unlike states that have

149. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 163-64 (July 20).

150. *See* RECOURSE TO FORCE, *supra* note 119, at 39.

151. *See* GRAY, *supra* note 145, at 165.

152. *See id.* at 167-68.

153. *See id.* at 165.

154. *Id.* at 232; RECOURSE TO FORCE, *supra* note 119, at 40.

155. *See* CONSTITUTIVE ACT OF THE AFRICAN UNION, *supra* note 17, art. 4(h).

156. *Id.*

accepted U.N. peacekeeping operations, however, the members of the African Union granted a prospective and open-ended consent by ratifying the Constitutive Act. In so doing, those states willingly surrendered a portion of their sovereignty in order to combat the human rights abuses that have plagued their continent.¹⁵⁷ The mutual agreement on the part of African Union member states to allow armed intervention in their internal affairs to put a stop to genocide, war crimes, or crimes against humanity renders such intervention legitimate under both the letter and the spirit of the U.N. Charter. Moreover, in light of the increasing demand within the international community for effective measures to address widespread human rights abuses, it is unlikely that the African Union's humanitarian intervention mechanism will be condemned in the court of popular international opinion.

IV. CONCLUSION: TOWARD A MODEL OF HUMANITARIAN INTERVENTION

The humanitarian intervention mechanism contained in the Constitutive Act of the African Union represents an encouraging step in the evolution of international law from a system primarily concerned with state sovereignty to one that seeks to vindicate the rights of individuals. By requiring states to prospectively consent to armed intervention in their internal affairs to put a stop to war crimes, genocide, or crimes against humanity, that system creates a promising framework for addressing heinous and systematic human rights violations such as those committed by the Zimbabwean government in Operation Murambatsvina.

Even in cases where such humanitarian intervention can be legally justified on the basis of a state's consent, however, problems of political will and limited resources remain. Those

157. Although African Union member states against whom the use of force is authorized may attempt to revoke their consent to humanitarian intervention in their internal affairs, such a revocation would conflict with their obligations under the Constitutive Act. *Id.* Therefore, any attempt by a state to withdraw its consent to humanitarian intervention in its internal affairs would result in an effective derogation of the Constitutive Act. Given the economic and political benefits of African Union membership, it is unlikely that states would be willing to renounce their membership in order to avoid being the target of intervention. In light of the requirement that two-thirds of African Union member states vote in favor in order to authorize intervention, the political repercussions of a state pursuing such drastic measures would be severe, both within the African Union and the wider international community.

problems are especially pronounced in the context of the African Union. Despite the existence of several urgent crises – most notably the widespread abuse and displacement of citizens in Darfur by the Sudanese government and the ongoing civil war in the Democratic Republic of Congo – the African Union has yet to authorize a humanitarian intervention to put a halt to human rights abuses. In order to assure that such interventions are possible, the international community should exert pressure on African states to address humanitarian crises. But political pressure alone will not be enough to guarantee that massive human rights violations are stopped before they result in irreparable loss of life and property; willing states should also provide funding and, if requested by the African Union, armed forces to carry out humanitarian interventions. If such aid is provided, Africa may find it possible to use its regional frameworks to effectively end the most egregious human rights abuses, thereby protecting the lives and livelihoods of its most vulnerable citizens.